FILED
AUG 27 1955
HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 353

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

UNITED STATES EX REL. CLEVELAND THOMPSON,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AND APPENDIX.

ALBERT A. FIOK,
Assistant District Attorney
JAMES F. MALONE, JR.,
District Attorney,
302 Court House
Pittsburgh 19, Pa.
FRANK P. LAWLEY, JR.,
Deputy Attorney General
HERBERT B. COHEN,
Attorney General,
State Capitol
Harrisburg, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 434-438 BLVD. OF ALLIES, PITTSBURGH 19, PA.

INDEX.

	PAGE
Opinions of Courts Below	2
Jurisdiction	4
Questions Presented	5
Statutes Involved	6
Statement of the Case	7
Reasons for Allowing Certiorari	11
Argument	13
I. The Court of Appeals for the Third Circuit should have considered the previous adjudication by this Court	13
II. Rulings on the admissibility of evidence, particularly evidence of intoxication some four hours after the commission of murder perpetrated in the commission of a felony does not come under the purview of the Fourteenth Amendment to the Constitution	16
III. Where findings of fact are based upon competent testimony, such findings of fact should not be overruled unless such are clearly erroneous	20

APPENDIX INDEX.

Opinion of the Court Below	23
Petition for Rehearing and to Convene the Court en banc	36
Order Denying Petition for Rehearing	46

DEC 24 1957

236714

TABLE OF CITATIONS.

CASES. PAGE

Alar v. United States, 212 F. 2d 565 21
Ashe v. Valotta, 270 U.S. 424 19
Brown v. Allen, 344 U.S. 443 ..... 5, 11, 13, 20
Commonwealth v. Blanchard, 345 Pa. 289, 27 A. 2d 48 18
Commonwealth v. Carter, 272 Pa. 551, 116 A. 409 .. 17, 18
Commonwealth v. Detweiler, 229 Pa. 304, 78 A. 271 16
Commonwealth v. Edwards, 380 Pa. 52, 110 A. 2d 216 16
Commonwealth v. Friday, 171 Pa. Super. Ct. 397, 90 A. 2d 856 19
Commonwealth v. Hine, 213 Pa. 97, 62 A. 369 ..... 17, 18
Commonwealth v. Sarkis, 164 Pa. Super. Ct. 194, 63 A.2d 360 18
Commonwealth v. Shroeder, 302 Pa. 1, 152 A. 835 .. 18
Commonwealth v. Simmons, 361 Pa. 391, 65 A. 2d 563 16
Commonwealth v. Thompson, 367 Pa. 102, 79 A.2d 401 ..... 2, 7
Commonwealth v. Wooding, 355 Pa. 556, 50 A. 2d 328 ..... 16, 17
Ex Parte Waller, 62 S. Ct. 1313 14
Fireside Marshmallow Company v. Frank Quinlan Const. Co., 199 F. 2d 511 21
Fisher v. United States, 328 U.S. 463 19
Goodman v. State, 20 Ala. App. 329, 102 So. 486 18
Graver Tank & Mfg. Co., Inc., et al., v. Linde Air Products Co., 339 U.S. 605 21

Table of Citations.

CASES. PAGE

Jordan v. Commonwealth, 181 Va. 490, 25 S.E. 2d 249 18
Pollock v. State, 136 Wis. 136, 16 N.W. 851 18
Raynor v. Wilmington, S. Car. R. Co., 129 N.C. 105, 39 S.E. 821 18
Rosenberg v. United States, 346 U.S. 273 14
Salsburg v. Maryland, 346 U.S. 545 19
Stein v. New York, 346 U.S. 156 ..... 19, 22
Thompson v. Dye, Warden, 345 U.S. 960 2
Thompson v. Pennsylvania, 342 U.S. 835, 929 2
United States v. National Association of Real Estate Boards, et al., 339 U.S. 485 21
United States v. Oregon State Medical Society, et al., 343 U.S. 326 21
United States ex rel. Thompson v. Dye, 103 F. Supp. 776 2
United States ex rel. Thompson v. Dye, 203 F. 2d 429 2
United States ex rel. Thompson v. Dye, 113 F. Supp. 807 ..... 3, 7, 8, 9, 20
United States ex rel. Thompson v. Dye, 208 F. 2d 565 ..... 3, 9
United States ex rel. Thompson v. Dye, 123 F. Supp. 759 ..... 3, 10, 20
United States ex rel. Thompson v. Dye, 221 F. 2d 763 ..... 3, 10

STATUTES.

Pennsylvania Penal Code, Sec. 701 6
Federal Rules of Civil Procedure, Rule 52 (a), 28 U.S.C. 5, 6
Rules of Decision Act, 28 U.S.C. Sec. 1652 ..... 12, 21

Petition for Writ of Certiorari to Court of Appeals for the Third Circuit.

IN THE

Supreme Court of the United States

No. ..... October Term, 1955

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

UNITED STATES EX REL. CLEVELAND THOMPSON,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Commonwealth of Pennsylvania, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in the above cause.

OPINIONS OF COURTS BELOW

1. The opinion of the Court of Oyer and Terminer of Allegheny County, Pennsylvania is not separately reported but is incorporated by reference and as part of the opinion of the Supreme Court of Pennsylvania.

2. The opinion of the Supreme Court of Pennsylvania, affirming the judgment and sentence of the Court of Oyer and Terminer of Allegheny County, Pennsylvania is reported at 367 Pa. 102, 79 A. 2d 401.

3. The order of the Supreme Court of Pennsylvania refusing a petition for rehearing is reported at 367 Pa. 102, 104, 79 A. 2d 401.

4. The order of the Supreme Court of the United States denying certiorari is reported at 342 U. S. 835.

5. The order of the Supreme Court of Pennsylvania, dismissing a petition for writ of habeas corpus, is not reported.

6. The order of the Supreme Court of the United States denying certiorari is reported at 342 U.S. 929.

7. The opinion of the District Court at No. 10,303 is reported at 103 F. Supp. 776.

8. The opinion of the Court of Appeals at No. 10,735 is reported at 203 F. 2d 429.

9. The order of the Supreme Court of the United States, denying certiorari, is reported at 345 U.S. 960.

10. The order of the Supreme Court of Pennsylvania, dismissing the second petition for writ of habeas corpus, is not reported.

11. The order of the Supreme Court of the United States, by Justice Harold H. Burton, denying a stay of execution, is not reported.

12. The opinion of the District Court at No. 11,525 (No. 1) is reported at 113 F. Supp. 807.

13. The opinion of the Court of Appeals at No. 11,136 is reported at 208 F. 2d 565.

14. The opinion of the District Court at No. 11,525 (No. 2) is reported at 123 F. Supp. 759.

15. The opinion of the Court of Appeals at No. 11,419 is reported at 221 F. 2d 763.

16. The order of the Court of Appeals at No. 11,419, denying a rehearing, is reported at 221 F. 2d 763.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on April 21, 1955. The order of the Court of Appeals for the Third Circuit, denying the petition by the Commonwealth of Pennsylvania for rehearing, was entered on May 23, 1955. The time for filing this petition was extended by this Court to August 29, 1955.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. In view of the mandate of this Court as expressed in *Brown v. Allen,* 344 U. S. 443, when this Court specifically stated the reason for denial of a stay of execution and disposed of a proposed petition for writ of certiorari, may the Court of Appeals ignore such adjudication and grant a writ of habeas corpus to a state prisoner upon the same or similar allegations?

2. Does the admissibility of evidence, particularly evidence of intoxication some three or four hours after the commission of murder perpetrated in the commission of a felony, come under the purview of the Fourteenth Amendment to the Constitution?

3. May the Court of Appeals, in apparent conflict with state law, declare what shall be and what shall not be substantive evidence in a state criminal prosecution?

4. In view of Rule 52 (a) of the Federal Rules of Civil Procedure, may the Court of Appeals overrule specific findings of fact of the district court without declaring such to be clearly erroneous or stating in what respect such are erroneous?

STATUTES INVOLVED

Section 701 of the Pennsylvania Penal Code of 1939, 18 Purd. Penna. Stat. Ann. 4701:

> "All murder which shall be perpetrated by means of poison, or lying in wait, or by any other kind of willful, deliberate and premeditated killing, *or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree.* All other kinds of murder shall be murder in the second degree. The jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether the person is guilty of murder of the first or second degree * * *
>
> "Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case. The court shall impose the sentence so fixed, as in other cases * * *" (emphasis supplied)

Federal Rules of Civil Procedure, rule 52 (a), 28 U.S.C.:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * *"

STATEMENT OF THE CASE

Sometime between 7 and 8 p.m. on September 13, 1949, Cleveland Thompson entered a drinking place at No. 20 Townsend Street, Pittsburgh, Pennsylvania, known as the Barbary Coast Club. With a 45 calibre Colt revolver he shot Aaron Daniels through the left arm. Daniels had been talking to the bartender, Russell Wallace, and was turning from the bar to leave when he was shot. Before the shot was fired, Cleveland Thompson, the defendant, said: "This is a stick-up, don't nobody move." The bartender remonstrated with the defendant and said: "Don't kill me, if you want the money, take the money. Don't kill me." There was further testimony that the bartender raised his hands in the air and that the defendant, after reaching in the bartender's pocket, backed him against the wall and shot him through the abdomen, killing him instantly. The defendant went behind the bar to the cash register. He then backed out of the door saying: "Nobody move, if you do, I will kill you."

The defense was intoxication, drug addiction, lack of memory and being under the influence of "everything." (R. 2b-9b). The trial court fully reviewed defendant's testimony concerning his condition in its charge to the jury. (R. 29b-31b). Reference was also made therein to defense counsel's argument for acquittal because of Thompson's alleged addiction to marijuana.

The law of Pennsylvania relating to intoxication and drug addiction to reduce the degree of the crime, if not a murder committed in the perpetration or attempted perpetration of certain enumerated felonies,

was fully covered in the charge. (R. 32b) The jury nevertheless returned a verdict of guilty of murder in the first degree and fixed the penalty at death. An appeal was duly filed and the Supreme Court of Pennsylvania affirmed the conviction and sentence. (367 Pa. 102, 79 A. 2d 401.)

Thereafter, a series of litigation was commenced which found the defendant four times before this Court, three times in the District Court, three times in the Court of Appeals for the Third Circuit and three times before the Supreme Court of Pennsylvania. In the long history of this case, the trial court was under attack; defense counsel was attacked and accused of dereliction of duty; certain police officers were charged with improper conduct; and finally, the prosecutor was charged with suppression of evidence. Previous to the filing of the last petition for writ of habeas corpus in the District Court, and following the denial of a petition for writ of habeas corpus by the Supreme Court of Pennsylvania, the defendant forwarded to this Court (a) a petition for stay of execution, (b) the record in the Supreme Court of Pennsylvania, and (c) a proposed petition for writ of certiorari in which similar but more extensive allegations were made as were later submitted to the District Court. On June 18, 1953, Mr. Justice Harold H. Burton entered the following order:

> "Upon examination of this petition, the record in the Supreme Court of Pennsylvania and the proposed petition for a writ of certiorari I find no substantial basis for granting this stay of execution and it is accordingly denied." (See 113 F. Supp. 807).

On June 19, 1953, the last petition for writ of habeas corpus was filed in the District Court alleging that the Supreme Court of the United States had *denied* certiorari. In it it was alleged that the Commonwealth withheld and suppressed vital testimony favorable to the relator at his trial, which could not only have lowered the degree of the crime but would also had a material bearing upon the penalty. Specifically, it was alleged that the Commonwealth suppressed evidence (1) which would have been given by police officer William Heagy to the effect that some three hours after the killing this officer observed the relator in a crazed condition, and (2) that the Commonwealth withheld and suppressed police reports made after relator's arrest which would have indicated that the relator was at the time of his arrest in such mental state that he did not have the capacity to commit the crime of willful and deliberate murder, or at least was in such a mental condition that the jury could well have returned a less severe penalty had the reports been made known to them. (R. 73b)

Following an extensive hearing, the District Court denied the petition (113 F. Supp. 807), in which it was found that the Commonwealth of Pennsylvania did not willfully and deliberately withhold or suppress evidence beneficial to the relator, and that the prosecuting attorney and the prosecuting officers had reason to believe from eyewitness accounts of the slaying that the relator *at that time* was in full control of his physical and mental faculties. The court below (208 F. 2d 565) remanded the case to the District Court for a finding of fact whether the court credited the testimony of the police officer or the prosecutor as to what the former told the

latter before trial about the condition of the accused at or about the time of his arrest. Additional testimony was taken over a period of three days and the District Court affirmed its previous findings of fact and conclusions of law. Additional findings were made and the petition was again denied. (123 F. Supp. 759) On appeal, the court below reversed the District Court (221 F. 2d 763) and set aside its findings of fact without stating that such findings of fact were clearly erroneous and remanded the case for the issuance of the writ of habeas corpus. A petition for rehearing and convening the court en banc was duly filed and on May 23, 1955, the petition was denied (221 F. 2d 763)

REASONS FOR ALLOWING CERTIORARI

1. The Court of Appeals for the Third Circuit decided a federal question of substance in a way, we submit, not in accord with applicable decisions of this Court. Although the attention of the court below was called to the adjudication by this Court of the same basic questions later presented in the district court, the Court of Appeals, nevertheless, held that there were substantial reasons for the granting of a writ of habeas corpus. This was done notwithstanding the adjudication by this Court, the Supreme Court of Pennsylvania, and the District Court. If the adjudication by the Court of Appeals is permitted to stand, the painstaking enunciations by this Court in *Brown v. Allen* are meaningless.

2. The decision of the Court of Appeals for the Third Circuit is in conflict with the decisions of the Supreme Court of Pennsylvania as well as those of the highest courts of other states which have held that the admissibility of evidence, the weight to be accorded thereto are matters for the determination of the states themselves and not matters which are to be regulated by the Federal courts. What is and what is not first degree murder is a legislative function of the state! What is and what is not substantive evidence is determined under state procedures. Under the Rules of Decision Act, Act of June 25, 1948, 28 U.S.C. section 1652, the law of the case is binding on federal courts.

3. The decision of the Court of Appeals overlooks the fundamental principle laid down by this Court that in our federal system the administration of criminal

justice is predominantly committed to the care of the states.

4. The decision of the Court of Appeals overlooks the plain provisions of Rule 52 (a) of the Federal Rules of Civil Procedure to the effect that findings of fact made by a district court are binding upon the appellate court unless found to be clearly erroneous. If such findings of fact have any basis (and we respectfully urge that they do) no substantial federal question was presented on appeal.

ARGUMENT

I.

The Court of Appeals for the Third Circuit should have considered the previous adjudication by this Court.

This case presents the serious federal question as to the effect to be given to this Court's denial of a stay of execution and a petition for writ of certiorari *when the reasons for the denial are stated.* It is the Commonwealth's position that the case of *Brown v. Allen,* 344 U. S. 443, should have controlled the lower federal courts in the disposition of this case. While this Court decided that when the reasons for the denial of certiorari are not stated, the denial should be disregarded in passing upon a subsequent application for relief except to note that the source of relief has been exhausted, this Court also decided (p. 489) that "when the reasons are given the decision to deny will have the effect indicated by the reasons stated."

Following litigation in the state and federal courts which lasted several years, relator, four days before execution was to have been carried out presented to this court (a) a petition for stay of execution, (b) the record in the Supreme Court of Pennsylvania and (c) a proposed petition for writ of certiorari. Extensive charges of suppression of evidence were made in these papers which were referred to Mr. Justice Harold H. Burton. On June 18, 1953, Mr. Justice H. Burton entered the following order:

> "Upon examination of this petition, *the record in the Supreme Court of Pennsylvania and the proposed petition for writ of certiorari, I find no sub-*

stantial basis for granting this stay of execution and it is accordingly denied." (Emphasis supplied).

The next day, on June 19, 1953, this Court gave consideration to a petition for a stay of execution in the case of *Rosenberg v. United States,* 346 U.S. 273. The stay in that case was denied in the following language: (p. 289).

"We think the question is not substantial.

We think further proceedings to litigate it are unwarranted."

Thereafter, the Rosenbergs' were executed.

The similarity of the orders entered in the two cases is striking. Unlike the federal case, however, litigation in the instant state case was not at an end. It is true that Mr. Justice Burton did not state that further proceedings were unwarranted, but the fact that the proposed petition for writ of certiorari was not docketed in this Court clearly indicated to the Commonwealth of Pennsylvania that the case was considered to be at an end and that the orderly processes of the state would not be interrupted further. (*CF. Ex parte Waller,* 62 S. Ct. 1313).[1]

Three days before execution and after the entry of the order signed by Mr. Justice Burton, the respondent filed a petition for writ of habeas corpus in the District Court for the Western District of Pennsylvania in which

---

[1] Mr. Justice Burton's order must apply with equal force to the proposed petition for writ of certiorari or else neither the District Court or the Court of Appeals had jurisdiction under the rule of *ex parte Hawk* as embodied in the Federal Code.

only *some* of the allegations of suppression made to Mr. Justice Burton were included. The District Court granted a stay of execution and ordered a hearing. The Commonwealth called the order of this Court to the District Court's attention, but it, nevertheless, refused to vacate the stay of execution or to dismiss the petition. After taking considerable testimony the District Court admitted that it had made a mistake in hearing the case and after making appropriate findings of fact, dismissed the petition.

The Court of Appeals for the Third Circuit completely ignored the order of this Court based upon the state record and which was specifically called to its attention. It also ignored the order of the District Court (based upon an extensive federal record) and set aside the judgment and sentence against respondent which had been secured five years before.

It is respectfully submitted that the Court of Appeals for the Third Circuit should have considered the adjudication by this Court in the instant case and should have affirmed the District Court in denying the writ of Habeas Corpus.

II.

Rulings on the admissibility of evidence, particularly evidence of intoxication some four hours after the commission of murder perpetrated in the commission of a felony does not come under the purview of the Fourteenth Amendment to the Constitution.

In Pennsylvania it is well settled that intoxication can only be a defense to a murder if *at the time of the commission of the felony* the defendant is intoxicated to such an extent that he does not have the ability to form the intent to commit the felony.

Commonwealth v. Edwards, 380 Pa. 52, 110 A. 2d. 216.

Commonwealth v. Detweiler, 229 Pa. 304, 78 A. 271.

Commonwealth v. Wooding, 355 Pa. 556.

As stated in *Commonwealth v. Simmons,* 361 Pa. 391, 404:

> "* * * Intoxication is not a defence to relieve a defendant from responsibility for crime except that in some cases of felonious homicide, if it so clouds the intellect as to deprive it of the power of deliberation or premeditation, it may serve to reduce the crime of murder from first to second degree. Where, however, a murder is committed in the perpetration of robbery or a burglary it is, irrespective of any question of intent, murder in the first degree, and therefore the fact that this defendant may have been drinking to excess was of no legal significance as bearing upon the degree of his crime."

In *Commonwealth v. Wooding,* supra, the Supreme Court of Pennsylvania said: (pp. 556, 557).

> "As the murder of Burnby was committed in the perpetration of a robbery it is not incumbent upon the Commonwealth in order to establish the offense as one of murder in the first degree, to prove premeditation or a specific intent to take life; *therefore, the fact that the defendant had possibly been drinking and smoking to excess was of no legal significance as bearing upon the degree of murder."* (Emphasis suplied).

In *Commonwealth v. Hine,* 213 Pa. 97, 99, the Court held that evidence of drinking eight hours before a killing, and that although the defendant's condition did not seem so much that of one who had too much liquor, it appeared to be that of one "who was getting the rams, or was under the influence of both drugs and liquors" was merely cumulative and remote. See also *Commonwealth v. Carter,* 272 Pa. 551.

Other than evidence presented by respondent at his original trial before a jury, he has not produced any additional evidence to contradict the eye-witnesses to the felony and killing who stated that *at the time* he was not intoxicated. The Commonwealth, knowing what one of its witnesses' testimony would be, asked what the respondent's condition was shortly after the killing. She gave testimony favorable to the defendant. This fact, we submit clearly negates any change of wilfull and deliberate suppression by the Commonwealth.

As to the time of the arrest, *some four hours after* the felony and killing, the Commonwealth produced no

evidence relating to respondent's condition. No such requirement exists either under state or federal law. Indeed, such evidence, upon objection would not be admissible because it would be too remote. *Commonwealth v. Hine,* supra; *Commonwealth v. Carter,* supra.[2]

One Circuit Judge agreed with the Commonwealth that such evidence would ordinarily be inadmissible, but in this case he concluded to the contrary because he erroneously assumed that the Commonwealth produced evidence as to respondent's sobriety at the time of his arrest. The trial record clearly indicates that the only Commonwealth witnesses at the time of arrest who tesified as to sobriety did so on cross-examination by defense counsel. This is not substantive evidence: *Commonwealth v. Schroeder,* 302 Pa. 1, 11; *Commonwealth v. Sarkis,* 164 Pa. Super. Ct. 194; *Commonwealth v. Blanchard,* 345 Pa. 289, 297. As it now stands, the decision of the Court of Appeals means that whenever evidence is brought out on cross-examination by a defendant for the purpose of attempted impeachment, the Commonwealth is required to produce evidence to aid in the impeachment of its own witnesses. Until now, no such rule has ever been recognized or enunciated in either the Federal or Pennsylvania Courts.

---

[2] In *Jordan v. Commonwealth,* 181 Va. 490, 25 S. E. 2d 249, evidence of intoxication ½ hour after killing was excluded; in *Goodman v. State,* 20 Ala. App. 329, 102 So. 486, evidence of intoxication as part of *res gestae* 1 hour afterwards was excluded; in *Pollock v. State,* 136 Wis. 136, 16 N.W. 851 court held it could be shown that Commonwealth witness was intoxicated at time of killing but could not show intoxication 1½ hour afterwards; in *Raynor v. Wilmington, S.Car. R.Co.,* 129 N.C. 105, 39 S.E. 821, evidence 4 hours after killing was excluded.

Argument.

In *Commonwealth v. Friday,* 171 Pa. Super. Ct. 397, 407, the Superior Court of Pennsylvania said:

> "* * * That is, appellant would have the Commonwealth supply information whereby appellant could test the credibility of the Commonwealth's own witnesses. No such duty rests upon the state police."
>
> "Should judicial pampering of convicts and defendants continue, we may arrive at a point where the prosecution will be bound to reveal every structural weakness in its case; that is, supply a defendant with a reasonable doubt. Until then, however, the Commonwealth is under no obligation to place the secret files of police investigators at the disposal of the defendants."

Significantly no authority, state or federal is cited by the Court of Appeals for this proposition.

The admissibility of and the weight to be accorded to evidence in state prosecution are matters peculiarly within the jurisdiction of the state courts and are to be determined under state procedures. Such considerations do not come under the purview of the Fourteenth Amendment to the Constitution. Conjecture cannot take the place of proof.

Stein v. New York, 346 U.S. 156, 192-193.
Salsburg v. Maryland, 346 U.S. 545, 550-557.
Fisher v. U. S., 328, .US. 463, 473-475.

The decision of the state supreme court on state law is not re-examinable. *Ashe v. Valotta,* 270 U.S. 424.

Neither by intention nor by result has the Fourteenth Amendment transformed the Court of Appeals

into a court of general review for the Commonwealth of Pennsylvania to which questions of general justice or equitable considerations are referred. And should state proceedings be constitutionally inadequate in any given case, such a finding should be determined by this Court rather than courts subordinate to the Supreme Court of Pennsylvania.

III.

Where findings of fact are based upon competent testimony, such findings of fact should not be overruled unless such are clearly erroneous.

The District Court carefully preserved all constitutional safeguards in permitting a hearing and the taking of voluminous testimony to determine whether any further basis existed for the complaint filed. Its refusal to grant habeas corpus was based upon careful consideration of all the evidence produced as well as the records in the state courts, together with the disposition made by Mr. Justice Burton of this Court. Specific findings of fact and conclusions of law were enunciated (113 F. Supp. 807; 123 F. Supp. 759) which showed clearly the careful consideration given to every allegation set forth by relator. It cannot, therefore, be said that the court below knew painfully little of the painfully little the District Court knew for the entire record was before it in a proper disposition of the case (*CF. Brown v. Allen*, supra, p. 494).

The Court below did not state or even hint that the findings of fact of the District Court were clearly erroneous or that the District Court abused its discretion in the evaluation of the testimony or the credibility of

witnesses. (See Rules 52 (a), Federal Rules of Civil Procedure). As a matter of fact the Court below specifically affirmed the finding of the District Court to the effect that Officer Heagy did not tell the prosecutor that the relator acted extremely drunk, incoherent and insane. This was the very foundation of the charge of suppression. Nevertheless, the Court below saw fit to ignore the findings of fact and conclusions of law of the District Court and substituted its own findings. (See for example, footnote 15 to opinion of Court of Appeals for Third Circuit App. p. 32).

Such unwarranted disregard of findings of the District Court violates the plain mandate of Rule 52 (a). The Commonwealth contends that where the findings of fact of a lower court are to be disregarded or modified as being clearly erroneous, the court so concluding should state in unmistakable language the respects in which such findings and conclusions are erroneous.

United States v. National Association of Real Estate Boards, et al., 339 U.S. 485, 494

Graver Tank & Mfg. Co., Inc., et al., v. Linde Air Products Co., 339 U.S. 605, 609-612

United States v. Oregon State Medical Society, et al., 343 U.S. 326, 332.

A Court of Appeals does not review findings of fact that are not clearly erroneous.

Alar v. United States, 212 F. 2d 565

Fireside Marshmallow Company v. Frank Quinlan Const. Co., 199 F. 2d 511.

Argument.

We respectfully urge that certiorari be granted to review the extraordinary action of the Court of Appeals. The Commonwealth agrees that "promptness in the disposition of criminal cases is one of the most important factors for a civilized system of criminal justice * * *." (*Stein v. New York*, supra 203) but the Court of Appeals has completely frustrated this important policy by its decision in this case.

We therefore respectfully urge that certiorari be granted.

ALBERT A. FIOK,
Assistant District Attorney.
JAMES F. MALONE, JR.,
District Attorney,
302 Court House,
Pittsburgh 19, Pa.
FRANK P. LAWLEY, JR.,
Deputy Attorney General.
HERBERT B. COHEN,
Attorney General,
State Capitol,
Harrisburg, Pa.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

—

No. 11,419

—

UNITED STATES OF AMERICA EX REL.
CLEVELAND THOMPSON,
Appellant
v.
CHARLES L. DYE, WARDEN, ALLEGHENY COUNTY JAIL,
Appellee.

—

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

—

Argued January 17, 1955.
Before McLAUGHLIN, KALODNER and HASTIE,
Circuit Judges.

Opinion of the Court

(Filed April 21, 1955)

By McLAUGHLIN, Circuit Judge.

A jury sitting in the Court of Oyer and Terminer of Allegheny County, Pennsylvania found relator-appellant guilty of murder in the first degree and recommended the death penalty. The conviction and the death sentence were affirmed by the Pennsylvania Supreme Court.[1]

The first time the matter came into the federal court was on application for habeas corpus which alleged

[1] 367 Pa. 102 (1951), certiorari denied 342 U.S. 835 (1951).

incompetence of defense counsel. We affirmed the denial of the writ by the district court.[2] Thereafter, following various other steps in the cause, another petition for habeas corpus was filed in the district court. The ground urged was the withholding and suppressing of vital testimony favorable to relator at his trial by the Commonwealth. After hearing the court denied the petition. On appeal we remanded the case to the district court for a finding of fact whether the court credited the testimony of police officer Heagy or the prosecutor as to what the former told the latter before trial concerning the condition of the accused at or about the time of his arrest.[3] In pursuance of this the district court made further findings of fact, particularly that:

> "2. Mr. Heagy did inform the prosecutor that he participated in the arrest of the relator in a barroom where the latter had been in a brawl and had been disarmed. He further informed Strauss, as the latter admits, that the relator was at that time under the influence of liquor to a quarrelsome degree; that he smelled the odor of alcohol on him; that his shirt and clothes were torn; and that he was perspiring and 'messed up'.
>
> "3. The prosecuting officers did not communicate to defense counsel or to the State trial judge prior to trial that, at the time of relator's arrest, several police officers detected the odor of alcohol on relator's breath; that he showed signs of having been engaged in a fight; and that at least

---

[2] 203 F.2d. 429 (1953), certiorari denied 345 U.S. 960 (1953).

[3] 208 F.2d 565 (1953).

one officer would say he was under the influence of liquor to a quarrelsome degree."

The court also made an additional conclusion of law, namely:

"The prosecuting officers were not in possession of information or evidence vital to relator's defense which they were obliged to disclose to the defense or to the court."

The court, citing our decision in United States ex rel. Almeida v. Baldi, 195 F.2d 815 (1952), certiorari denied 345 U.S. 904 (1953), quite properly states: "The suppression of evidence may be a denial of due process when it is vital evidence, material to the issues of guilt or penalty." See also United States v. Rutkin, 212 F.2d 641, 644-5 (C.A. 3, 1954).

The important question before us is whether the district judge erred in holding as a matter of law that the withheld and suppressed evidence was not vital to the defense of the accused.

The prosecution had alternative theories: (1) that Thompson had committed the killing of Wallace Russell, the bartender at a place called the "Barbary Coast", in the course of an armed robbery; or (2) that Thompson wilfully and with premeditation killed said Wallace Russell. The defense, while admitting the killing, denied any robbery motivation and contended that Thompson through drink and drugs was in such a mental state that he could not have formulated the necessary intent to raise the killing to first degree murder and that in any event, because of his condition, his offense did not warrant the death penalty. Thompson's testimony was to

that effect. One prosecution witness, Mattie Spells, to some extent corroborated him but on a plea of surprise as to another matter the Commonwealth impeached her credibility. One eye witness to the shooting testified that Thompson did not appear intoxicated. The Commonwealth also produced the bartender at the place where Thompson was arrested, and he testified that there was nothing wrong with Thompson, that he was not drunk, and that his eyes were normal and not glassy. The only police witness questioned as to Thompson's condition was the other arresting officer, Dubis. He said Thompson was "perfectly normal" and "perfectly all right in every respect". He said nothing regarding an odor of alcohol on Thompson's breath and when asked how he knew he was all right, he replied "The man walked out with me. I have arrested many a drunk, if you are referring to that."[4]

None of the other police officers who were witnesses at the trial said anything about Thompson's condition or relating to an odor of alcohol on him. Officer Heagy, though subpoenaed by the Comomnwealth as a witness and present at most of the trial, was not called to the stand by the prosecutor. He was actually excused by the prosecutor from attendance at the night session of the trial at which Dubis testified. Heagy therefore did not hear that testimony nor, according to him, hear about

---

[4] At the district court habeas corpus hearing Dubis testified that he did detect an odor of alcohol on Thompson's breath and that "His shirt was torn open, and there was nothing under him but his bare skin * * * he was sweating * * * he looked like he took a beating; * * * it looked like somebody grabbed his hair and was pulling on his hair."

it until long after the trial. Thompson was arrested within approximately four hours of the shooting. The commonwealth argues from this that Heagy's testimony is irrelevant because it is too remote. The proofs do not justify that contention.

The shooting occurred in the Barbary Coast somewheres around 7:00 o'clock in the evening of September 13, 1949. The Commonwealth produced three eye witnesses who said that they were eating fish sandwiches and drinking soda pop at the time of the shooting. According to their testimony they saw no one in the Barbary Coast drinking intoxicating liquor.[5] One police officer who had made an examination of the premises the night of the shooting, testified: "There was no evidence of beer or liquor. Nothing outside of three empty cases of soft drinks."[6] According to Thompson, however, the only drinks served at the Barbary Coast were "moonshine whiskey and a glass of water." He testified at the trial that he had started drinking in the Barbary Coast around 3:00 o'clock that afternoon; that prior to the shooting he had drunk at least four pints of moonshine whiskey "drinking pint for pint" and in addition had been smoking marijuana which he bought "from

---

[5] A fourth eye witness said that he was drinking a bottle of beer and a fifth eye witness said they were giving away beer, wine and pop but not one of the five corroborated Thompson's story that moonshine whiskey was being sold.

[6] Two other police officers, however, said they did find four gallons of moonshine whiskey under the bar; Thompson's ex girl friend said everyone was drinking moonshine; and the manager of the place admitted on cross-examination that some people there "could have been" drinking moonshine.

a guy peddling it in there."[7] He said he imagined he smoked about four marijuana cigarettes during the time he was there,[8] He said that at the time of the shooting "I was under the influence of everything."

In the interval between the shooting and his arrest there was testimony at the trial that Thompson visited the home of Mattie Spells around 8:00 P.M. and asked for a loan of two dollars. Mattie Spells testified that she never saw him looking like he did that night. "His eyes were glarey. He wasn't himself at all. * * * He looked like he was under the influence of something that particular night." There was also testimony that he walked right past the police station and, shortly after 10:00 o'clock that night,[9] arrived at the Triangle Bar which was some nine or more blocks from the Barbary Coast and "all up hill."[10] At the Triangle, he was observed "sliding up and down the bar" and taking a "tuck at his coat" where the bartender observed his gun. The

---

[7] At the time of his arrest seven cigarettes were found in his possession but the Commonwealth produced an expert witness who, upon analyzing one of the cigarettes, had found no marijuana.

[8] Earlier in 1949 he was picked up on suspicion of using marijuana. He also testified that he had sustained a nervous breakdown when overseas in 1942 during his Army service, for which he had been given paraldehyde, phenobarbital and later on electric shock treatments.

[9] September 13, 1949 was an election day in Pittsburgh. In accordance with the law the Triangle Bar did not open until 10:00 P.M.

[10] Further testimony adduced at the habeas corpus hearings showed that Thompson, between the shooting and his arrest, also went to his own home were he stayed for about fifteen minutes, visited the home of Mr. and

bartender called the police. Meanwhile Thompson had asked another patron for a cigarette (even though Thompson had seven on him when arrested) and when told he had none, Thompson pushed one hand in his face and reached for his gun. The patron grabbed him and with the help of others, Thompson was disarmed and held down until Patrolmen Dubis and Heagy arrived to make the arrest.

According to the Triangle bartender who served him, he gave Thompson only two drinks. There is no evidence from the bartender or Thompson or anyone else that Thompson actually drank any liquor in the Triangle or anywhere after leaving the Barbary Coast. Assuming that he did take the two drinks at the Triangle there is nothing which would warrant an inference that what the police officers observed about his condition shortly thereafter had been brought about by those two drinks and was not a continuation of the state he had been in at the time of the shooting. Clearly the relevancy and weight of the heretofore undisclosed evidence of the arresting officers and some of those at the station[11] was for the jury. From Heagy's conclusion that Thompson was under the influence of liquor to a quarrelsome degree, plus his statement that Thompson smelt of

---

Mrs. Loice Spells (brother and sister-in-law of Mattie Spells) for about a half hour, and with the help of Mr. Spells who "partly toted him" went back to Mattie Spells' house a second time. His landlady, Mrs. Katherine Smith, testified that he "fell up the steps" and was in "a very drunken, stupid condition." Both Mr. and Mrs. Spells said he was in a drunken or drugged condition—"he was drunk and staggering."

[11] Patrolman Lippi said at the habeas corpus hearing that Thompson was "good and drunk."

alcohol, that his shirt and clothes were torn, and that he was messed up, together with Dubis and other policemen now saying that Thompson smelt of alcohol, that he showed signs of having been engaged in a fight, and with Mattie Spells stating at the trial that after the shooting Thompson "looked funny and while his eyes were all glassy I was afraid of him" and with no evidence of further drinking at all after the shooting except perhaps the two drinks at the Triangle Bar shortly before he was arrested, the jury could have reasonably inferred that Thompson had been in a far worse state of intoxication when he shot Russell than at the time he was arrested and from the same causes.

But, argues the State, even so, the proffered evidence is merely cumulative. It argues that Thompson had so testified as did Mattie Spells. Thompson, the defendant, did tell about the dreadful thing he had done while "under the influence of everything" as best he could which wasn't very good and was not believed by the jury. Mattie Spells had been discredited by the State. In that situation the effect of Heagy's testimony, of Dubis finally revealing that he had smelt alcohol on Thompson, and of the other police witnesses verifying this, might well have induced the jury to believe Thompson's evidence about his physical and mental state. The result could have been a finding of second degree murder,[12] or if first degree, a recommendation of life im-

---

[12] "Intoxication sufficient to deprive the mind of power to form a design with deliberation and premeditation, and to properly judge the legitimate consequences of an act, will reduce a killing from murder in the first degree to murder in the second degree." Commonwealth v. McCausland, 348 Pa. 275, 277 (1944).

prisonment.[13] Admittedly, even with that evidence the jury might well not have accepted Thompson's testimony, indeed might not have credited Heagy, Dubis and the other policemen. But those conjectures do not permit that evidence to be brushed aside as merely cumulative. Nor can it be held as a matter of law to be unimportant to the defense here. It was substantial evidence which should have been but never was submitted to the jury (the only tribunal entitled to pass upon it) in connection with what the court did charge as to the effect of the drunkenness of Thompson or that he was under the influence of marijuana or a drug at the time of the killing.[14] See Commonwealth v. Edwards, 380 Pa. 52 (1955); Commonwealth v. Detweiler, 229 Pa. 304 (1910).

Appellee's final point is that Heagy was available as a witness for the defense and it cites the district court's language that "Evidence is not suppressed or withheld if the accused has knowledge of the facts and circumstances or if they otherwise become available to him during the trial." We have no quarrel with that general principle but it has no relevancy to the facts before us.

---

[13] "It is true * * * that the question of intoxication was important in connection with the determination of the penalty * * *." Commonwealth v. Simmons, 361 Pa. 391, 404 (1949), certiorari denied 338 U.S. 862 (1949).

[14] The opening language of the trial court on this point was:

"Now, members of the jury, at this point I desire to call to your attention the effect of the drunkenness of this defendant, or that he was under the influence of marijuana, or a drug at the time of this occurrence. *That is a fact for you to find.*" (Emphasis supplied).

Heagy was in court as a potential prosecution witness throughout the trial with the exception of the night Dubis was on the stand. The latter gave damaging evidence against the defendant. At the close of the night session at which Dubis testified, the prosecutor stated in open court: "At this time I could call a few police officers who would *corroborate what has already been testified to.* I see no reason why we should merely prolong the testimony now when witnesses are not here." (Emphasis supplied). That was the trial picture on this particular phase of the state's case and there was no knowledge by Thompson or anyone interested in him that Heagy's testimony differed so vitally from that of Dubis until years after the trial. Had the defense trial lawyer been without peer as an advocate he still could hardly have been held to putting the second arresting officer on the stand where there was every reasonable expectation that his story would dovetail with what Dubis had said. The contention apparently seriously urged that this application must fall because under the facts of the trial the defense did not call Officer Heagy is specious. We cannot accept it.[15]

---

[15] Appellant has two other points: (1) that the trial court erred in not finding that Officer Heagy also told the prosecutor that Thompson acted extremely drunk, incoherent and insane; and (2) that the trial court erred in refusing to admit Officer Heagy's statement that while fatally wounded in the line of duty, to the effect that everything he had said at the habeas corpus hearing was the truth. On the first we are unable to find the district judge clearly wrong as there was evidence supporting his conclusion. On the remaining point, the statement was hearsay. It was not within the dying declaration exception. 5 Wigmore, Evidence, Sec. 1433 (3rd ed. 1940). It was therefore properly excluded.

The judgment of the district court will be reversed and the case remanded for the issuance of a writ of habeas corpus. However, nothing we have said here precludes a new trial or the taking of proper steps to hold the defendant in custody pending such a new trial. See United States ex rel. Almeida v. Baldi, supra, p. 825, footnote 30.

KALODNER, *Circuit Judge,* concurring

I agree with my brethren that *under the special circumstances existing in this case* the District Court erred in denying relief to the accused.

In my opinion since the Commonwealth introduced testimony by the Triangle Bar bartender and Dubis, one of the arresting officers, at the accused's trial, that he was *not* under the influence of liquor at the time of his arrest some four hours after the shooting and that it further stated to the jury that it "could call a few other police officers who would corroborate what has already been testified to" (by the bartender and Dubis) that it committed fundamental unfairness to the accused by withholding Heagy's available testimony that the accused *was* "under the influence of liquor". The Commonwealth's present contention that Heagy's testimony is irrelevant because it is too remote doesn't square with its introduction of the bartender's and Dubis' testimony dealing with the same "remote" period. The Commonwealth cannot have its cake and eat it too. If, under its view, testimony of sobriety four hours after the shooting was relevant at the trial, certainly Heagy's testimony to the contrary was also relevant.

For this specific reason alone I would reverse, because it cannot be gainsaid that the Commonwealth's

suppression of Heagy's testimony constituted fundamental unfairness under the circumstances recited.

I have stated this view because in my opinion Heagy's testimony would ordinarily have been inadmissible since it related to a time four hours after the shooting occurred and its suppression (absent the offering by the Commonwealth of testimony as to the accused's sobriety four hours after the shooting) would not have constituted fundamental unfairness by reason of its lack of relevance to establish the accused's sobriety or drunkenness at the time of the shooting.

While the Pennsylvania courts have not declared themselves on this issue of relevance of testimony as to sobriety or drunkenness four hours after a crime is committed other jurisdictions have uniformly ruled such evidence inadmissible.[1]

HASTIE, *Circuit Judge*, concurring.

This concurrence expresses an additional thought about the problem of this case rather than any disagreement with the reasoning of the court. My concern is that no unduly broad implications be read into this decision.

---

[1] In Jordon v. Commonwealth, 181 Va. 490, 25 S.E. 2d 249, evidence of intoxication one-half hour after killing was excluded; in Goodman v. State, 20 Ala. App. 329, 102 So. 486, evidence of intoxication as part of res gestae one hour afterwards was excluded; in Pollock v. State, 136 Wis. 136, 116 N.W. 851 court held it could be shown that Commonwealth witness was intoxicated at time of killing but could not show intoxication one and one-half hours afterward; in Raynor v. Wilmington, S.C. R. Co., 129 N.C. 105, 39 S.E. 821, evidence four hours after killing was excluded.

The matter in controversy is the extent of the duty of public officers charged with the investigation and prosecution of crime when they discover conflicting evidence on a material point. The government and the court below seem to have believed that once the prosecutor, having examined all of the available evidence, is convinced that the truth of an issue lies on one side he is relieved of any obligation to disclose the existence of evidence which in some degree supports what he believes would be a false conclusion. However, it seems to me that it is not possible to lay down a rule of thumb for such situations. It can be said that the prosecutor must not act in an essentially unfair way. But this is an area in which the question of fundamental fairness depends so much upon the facts of the particular case that a precise rule can not be devised.

It seems likely that many situations will arise in which a prosecutor can fairly keep to himself his knowledge of available testimony which he views as mistaken or false. But there are other circumstances in which a prosecutor must, or certainly should know that even testimony which he honestly disbelieves is of a type or from a source which in all probability would make it very persuasive to a fair minded jury. This is notably true of testimony of a police officer, and most certainly of an arresting officer, favorable to a contention of the accused person. Here the prosecutor not only kept quiet about the existence of such testimony, but, as Judge McLaughlin points out, even stated in open court that other police officers if called "would corroborate what already has been testified to." Thus, the wrong of nondisclosure of obviously significant testimony was compounded by a

misleading affirmative statement as to the nature of the available but unused testimony.

In brief, it is not every case in which the prosecution must reveal the availability of testimony inconsistent with the government's contentions. But in special circumstances such nondisclosure may, and here it certainly does, amount to fundamental unfairness in the trial of a criminal case.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Petition for Rehearing and to Convene the Court En Banc.

The Commonwealth of Pennsylvania, for the appellee above named, respectfully petitions this Honorable Court for a rehearing of the appeal in the above entitled cause and in support of this petition represents the following:

1. Reserving our argued position as to each of the points of appeal, this petition is addressed solely to those features of the separate opinions of this Court entered April 21, 1955, wherein we believe this Court may be convinced that the separate opinions rendered are based upon the application of erroneous facts and incorrect legal principles.

2. This Court erred in concluding that special circumstance exist in this case, to-wit, that "the Commonwealth introduced testimony by the Triangle Bar bar-

tender and Dubis, * * * that (relator) was *not* under the influence of liquor at the time of his arrest some four hours after the shooting (Opinion by Judge Kalodner, p. 9)". The trial record clearly shows that neither the bartender nor Officer Dubis, nor any other Commonwealth witness with the exception of Mattie Spells, (See appellee brief, p. 28) testified on *direct* examination either as to the sobriety or intoxication of the defendant. On the contrary, whatever testimony was adduced from these witnesses was brought out under cross-examination. *This is not substantive testimony*: *Commonwealth v. Schroeder,* 302 Pa. 1, 11; *Commonwealth v. Sarkis,* 164 Pa. Super. Ct. 194; *Commonwealth v. Blanchard,* 345 Pa. 289, 297. As it now stands, the decision of this Court means that whenever evidence is brought out on cross-examination by a defendant for the purpose of attempted impeachment, the Commonwealth is required to produce evidence to aid in the impeachment of its own witnesses! Until now, no such rule has ever been recognized or enunciated in either the Federal or Pennsylvania courts.

3. In view of the foregoing, this Court erred in not basing an affirmation upon the law that the alleged evidence of Officer Heagy would have been inadmissible (either as to degree or penalty) if it had been offered at the trial and an objection had been made thereto. In this respect, but for the erroneous assumption of fact that the Commonwealth introduced the evidence of sobriety, the Commonwealth agrees with the observations of Judge Kalodner that the exclusion of this evidence, relating to a time four hours after the shooting and to the sobriety of the relator at that time, "would not have constituted fundamental unfairness by reason

of its lack of relevance to establish the accused's sobriety or drunkenness at the time of the shooting."

4. It is respectfully submitted that the opinion of Judge McLaughlin is in grave error in the following respects:

a. In concluding that the bartender at the place where Thompson was arrested testified for and was produced by the Commonwealth to establish the sobriety of the defendant. The trial record (177a-182a) clearly shows that the witness (Richardson) *did not* so testify on *direct examination*. Any evidence as to sobriety or intoxication was elicited under *cross-examination* by defense counsel in an obvious attempt to set the pattern of defense.

b. In concluding that the only police witness questioned as to defendant's condition was the other arresting Officer, Dubis. The trial record (203a-206a) clearly shows that he *did not testify to any state of sobriety or intoxication of the defendant during the entire direct examination* and that any evidence referring to such was brought out on *cross-examination* by defense counsel himself in an attempt to impeach his credibility.

c. In effect concluding that the burden was on the Commonwealth to show the defendant's intoxication prior to the killing. Reference is made to the testimony that, after the killing, the defendant had two drinks at the Triangle bar some three hours after the killing and that these *two drinks* could not have brought about intoxication to a degree testified by the defendant, and that, therefore, he must have been intoxicated *before* the killing. This assumption completely ignores that fact that in at least two places in the trial record (333a, 415a)

the defendant made reference to two other bars he must have been in after the killing. There is no evidence as to how long he remained or how much he had to drink. Furthermore, this conclusion completely negates the testimony of eye witnesses to the killing, who had the opportunity to observe and state that the defendant appeared all right. No evidence was produced to contradict these witnesses, and, therefore, it is respectfully submitted that this Court cannot completely ignore their uncontradicted testimony.

5. The opinion of Judge McLaughlin is in error in the further particulars:

a. In imputing dereliction on the part of the prosecutor in not disclosing information possessed by such witneses as patrolman Lippi, and "some of those at the station" when the evidence clearly shows that such information was not brought to the attention of the prosecutor, and particularly in view of the categorical statement of patrolman Lippi that he *did not* talk about this case to anyone until the last habeas corpus proceedings in the district court. (Appx. 54b-55b)

b. In concluding that impeaching evidence brought out on cross examination is substantive evidence. (See *Commonwealth v. Shroeder; Commonwealth v. Sarkis, Commonwealth v. Blanchard,* cited *supra*).

c. In concluding that the Commonwealth had two alternative theories concerning the murder. The sole premise on which the case was tried was a killing in the perpetration of a robbery which, under Pennsylvania law, was automatically first degree murder. The trial record clearly shows this. Intent is not a considera-

tion in a felony killing. See *Commonwealth v. Simmons,* 361 Pa. 391, 404.

d. In concluding that the prosecuting officer wilfully suppressed evidence based upon the fact that Officer Heagy was actually excused by him from attending the *night session* at which Officer Dubis testified. The record (Appx. 82b) reveals that Officer Heagy was excused at his own request after asking the prosecutor whether he would be used *"today"*. This occurred during a recess about 3:00 P. M. before it was determined that the court would hold a night session. As a matter of fact, Officer Heagy (Appx. 82b) testified that at no time did the prosecutor state or convey the impression that his testimony would be withheld because it would hurt the Commonwealth's case. Furthermore, Officer Heagy testified at the habeas corpus hearing (N.T. 36, June 24, 1953) that he didn't know there was to be a night session when he asked to be excused.

e. In concluding, under the circumstances of this case, that the degree of the crime could have been second degree murder and in misrepresenting the holding of *Commonwealth v. McCausland,* 348 Pa. 275, wherein a felony-murder was not involved.

f. In holding that the testimony of Officer Heagy at the habeas corpus proceeding more than four years after the killing, would have been substantial evidence to reduce the crime from first degree murder to second degree murder if the same would have been given at the trial.

g. In crediting Officer Heagy's statement that he did not hear about Officer Dubis' testimony until long

after the trial, in view of the fact that Officer Heagy was present when the trial court charged the jury as to Dubis' testimony. He was also present when other witnesses present at the arrest testified on cross-examination as to the defendant's state of sobriety. (See brief of appellee, p. 31)

h. In concluding that evidence of intoxication to a *quarrelsome degree* is vital evidence as to the degree of the crime or in mitigation of penalty, the nondisclosure of which amounts to fundamental unfairness. This is especially true since defendant's detailed testimony as to events surrounding the killing negates any conclusion that intoxication robbed him of his self-control. (See appellee's brief, pp. 4-5, 42-43)

i. In taking out of context the statement of the prosecutor: "At this time I could call a few other police officers who would *corroborate what has already been testified to.* I see no reason why we should merely prolong the testimony now when the witnesses are not here." The trial record clearly shows reference to this testimony to be erroneous when applied, as here, to the sobriety or intoxication of the defendant.

6. This Court erred in finding or concluding that the Commonwealth deliberately suppressed evidence. Such ignores the *contrary* finding, (based upon substantial evidence) by the court below, to-wit: "20. The prosecuting officers of the Commonwealth of Pennsylvania did not wilfully and deliberately withhold or suppress evidence beneficial to the relator." (*United States ex rel. Thompson v. Dye,* 113 F. Supp. 807, 810). This finding of fact is not clearly erroneous, especially in view

of the opportunity which the court below had to judge the credibility of the witnesses [Rule 52(a)], Federal Rules of Civil Procedure).

7. This Court erred in concluding that relator's trial was fundamentally unfair in view of the finding of the Honorable Harold H. Burton, Associate Justice of the Supreme Court of the United States, that there was no SUBSTANTIAL BASIS for granting a stay of execution to relator after examination, among other things, of a petition in which relator alleged that Heagy would testify that relator, at the time of arrest, was in a dishevelled condition, frothing at the mouth, mucous streaming down his face, his eyes were blood red or he was crazy; and that the Commonwealth wilfully and deliberately suppressed this evidence and sent Heagy out of Court. The Commonwealth did not have time to file an answer to this petition and therefore for the purposes of Justice Burton's consideration the allegations had to be accepted as true, under the rule of this Court in *United States ex rel Almeida v. Baldi,* 195 Fed. 2d 815. Relator's proof in the court below does not substantiate the allegations made to Justice Burton. The granting of a stay of execution requires far less reason than the granting of a writ of habeas corpus. The decision of this court in effect holds that Justice Burton erred in finding no substantial basis for a stay of execution even though the allegations presented to him were much more far reaching.

8. This Court erred in not basing its determination upon the finding of fact made by the court below that "(Heagy) did not inform the prosecutor that the relator appeared and acted extremely drunk, incoherent

or insane (Rel. Appx. 15a)." On the second appeal of this case (208 F. 2d 565. 566), this Court stated that the principal contention of relator was that the prosecutor had been informed by Heagy that appellant acted *drunk, incoherent* and *crazed.* The case was remanded for a finding to whether *such* information was conveyed to the prosecutor. The *per curiam* opinion of this court states: "We think a finding on this issue is essential to a proper disposition of this case on its merits * * * the omitted finding goes to the very essence of the complaint of fundamental unfairness." The finding of the court below upon remand (which finding is also based upon substantial evidence and is not clearly erroneous) completely negates relator's complaint of fundamental unfairness. Since this court stated that a finding on this point goes to the "very essence of the complaint of fundamental unfairness" it should not have ignored the unequivocal finding relating thereto made by the court below.

9. It is respectfully submitted that the opinion of Judge Hastie is in error in the following respects:

a. In concluding that under the circumstances of this case there was a duty on the prosecutor to disclose the alleged existence of evidence supporting the theory of defense. First, it should be pointed out that the prosecutor (See Additional Findings of Fact No. 2, District Court) was informed that relator *at the time of arrest* was under the influence of liquor to a quarrelsome degree; that there was an odor of alcohol on him when arrested (some four hours after the killing) and that the relator was perspiring and messed up. This is certainly not unusual in felony cases and had little if anything to do with the defense of intoxication to a

point where defendant did not know what he was doing or to the defense of allegedly being under the influence of narcotics. Second, intoxication to a quarrelsome degree had no relevancy to a felony-killing where intent is *not* a consideration. There is nothing fundamentally unfair in not disclosing this evidence which, on objection, could *not be introduced* into evidence.

b. In setting forth a rule or principle supposedly to guide the action of prosecutors which does not disclose any rules to follow. Under the rule set forth, no prosecutor can be assured that his case, in years to come, will not be upset by this Court because some evidence, no matter how slight, whether material or not, whether admissible or not, has not been conveyed to the defense! What are the circumstances and situations alluded to in which a prosecutor need not disclose available testimony? How can he be certain of sustaining a conviction short of creating out of the office of district attorney a super legal aid society? It is respectfully submitted that if the rule is laid down, some "rule of thumb" should also be enunciated for the guidance not only of state, but also federal prosecutors.

c. In concluding that the statement of the prosecutor to the effect that other police officers, if called, "would corroborate what already has been testified to" referred to the mental condition of the accused when, up to that time, *no one testified on direct examination to any state of sobriety or intoxication of the accused!* The statement is cited out of context and applied to a situation as though existing when, in fact, such did not exist. The rule as enunciated, based upon such miscomprehension of the facts, is not possible to follow in sustaining a conviction.

WHEREFORE, for the foregoing reasons, this petition for rehearing should be granted, and because the several opinions of this Court overrules in effect the refusal of the Supreme Court of Pennsylvania to hear the constitutional issues raised, and the refusal of the United States Supreme Court to grant a stay of execution on allegations more substantial than those advanced in the present proceedings, the rehearing should be convened before the Court en Banc.

ALBERT A. FIOK,
Assistant District Attorney
JAMES F. MALONE, JR.,
District Attorney
FRANK P. LAWLEY, JR.,
Deputy Attorney General
HERBERT B. COHEN,
Attorney General.

Attorneys for Appellee.

Order.

Commonwealth of Pennsylvania }
County of Allegheny } ss.:

Before me, the undersigned authority, personally appeared ALBERT A. FIOK, Assistant District Attorney of Allegheny County, Pennsylvania, who, being first duly sworn, on oath certifies and says that he is one of the attorneys for appellee in this cause; that he makes this certificate in compliance with Rule 33 of the Rules of this Court; that in his judgment the foregoing petition for rehearing and request for convening the Court en Banc is made in good faith, well founded, and is not interposed for delay.

/s/ ALBERT A. FIOK

Subscribed and sworn to before me this 4th day of May, 1955.

/s/ HENRY RIVLIN
Notary Public

Order

Present: MCLAUGHLIN, KALODNER and HASTIE,
Circuit Judges.

AND NOW TO WIT, on this 23rd day of May, 1955, it is ORDERED that Footnote #11, appearing at the bottom of page 6 of the slip opinion in this case filed April 21, 1955, be stricken.

IT IS FURTHER ORDERED that the petition for rehearing in this case be denied.

BY THE COURT,

MCLAUGHLIN,
Circuit Judge.

SEP 26 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 353

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

UNITED STATES ex rel. CLEVELAND THOMPSON,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LOUIS C. GLASSO,
ZENO FRITZ,
Attorneys for Respondent,
502 Plaza Building,
Pittsburgh 19, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

INDEX

PAGE

Argument 1-4

TABLE OF CITATIONS

Brown v. Allen, 344 U.S. 433 4

United States ex rel. Almeida v. Baldi, (1952), 195 F. 2d 641 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 353

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

UNITED STATES ex rel. CLEVELAND THOMPSON,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

1. Respondent directs the attention of this Court to the fact that the petitioner is the *Commonwealth of Pennsylvania;* and that the petitioner is *not* a party to this proceeding. It was not a party originally; and at no time, did it intervene. The caption appearing at page 23 of petitioner's paper-book correctly sets forth the parties.

Hence, it is respectfully submitted that for the foregoing reason alone, the within petition should be denied or dismissed.

2. The questions which petitioner states are presented for review do not arise from the record.

(A) The Court of Appeals did *not* set aside any findings of fact of the District Court.

A reading of its opinions demonstrates that. The question which was decided was "Whether the District

Judge erred as a matter of law that the withheld and suppressed evidence was vital to the defense of the accused". No new or additional findings were made by the Court of Appeals. It merely decided that the District Judge drew erroneous conclusions of law from his own findings of fact.

(B) Nor did the Court of Appeals decide "what shall be and what shall not be substantive evidence in a state criminal prosecution".

It decided that, under the circumstances prevailing when the respondent was being tried for murder, the suppressed and withheld evidence was vital to his defense; and that, therefore, by suppressing such evidence he was deprived of his constitutional right to a fair trial. Such a decision was proper and the opinions of the Judges of the Court of Appeals establish its correctness.

Petitioner does not seem to understand what was the issue. The issue was *not* whether *generally* evidence of intoxication is vital; nor whether *generally* "the admissibility of evidence, particularly evidence of intoxication some three or four hours after the commission of murder prepetrated in the commission of a felony, comes within the purview of the 14th Amendment to the Constitution". The issue was narrow and specific —whether in the instant case where the respondent being on trial for murder defended himself by contending that through drink and drugs his mental condition was such that he could not have formulated the intent required to raise the killing to first degree murder and further because of that mental condition his offense did not warrant the death penalty, the suppression of

testimony from the arresting officer and other police officers substantiating his defense was of such a nature as to deprive him of a fair trial within the meaning of the provisions of the Constitution.

The District Court found that such evidence has been suppressed and withheld by the prosecuting officer. The Court of Appeals accepted those findings and differed as to the effect of that suppression. The prosecutor argued that inasmuch as he considered the suppressed evidence irrelevant because too remote and merely cumulative since some like evidence from a discredited witness crept into the case, the respondent was not harmed, constitutionally speaking. The Court of Appeals rejected those contentions; and under the authority of *United States ex rel. Almeida v. Baldi,* (1952), 195 F. 2d 641, certiorari denied 345 U. S. 904, its holding was correct. The reasons set forth in that case apply with equal cogency to the instant case.

When respondent was being tried for murder, there was an issue as to whether there was a robbery and whether the killing occurred during a robbery. As the Court of Appeals stated, the prosecutor had alternate theories: (a) a willful and deliberate killing, or (b) a killing during the perpetration of a robbery. The respondent's mental condition arising from drunkenness was admissible under the first theory; and also, to affect the penalty under the second. Whether under the circumstances of the instant case the condition some three or four hours after the killing was too remote was for the trial judge, and not for the prosecutor, to determine. Certainly, the latter's subsequent rationalization that

the evidence he suppressed was inadmissible does not justify his suppression thereof.

And the prosecutor's argument that since some testimony from a discredited witness, similar to that which he withheld, crept into the case, a suppression of the most effective and persuasive evidence substantiating respondent's defense was but a suppression of "cumulative" evidence, is also rationalization sans justification.

The Court of Appeals, in its opinions, sets forth the facts and the reasons so forcefully that the respondent feels nothing more should or could be added; and he is submitting his cause thereon.

3. Respondent submits that the refusal of a stay of execution by one of the Justices of this Court does not have the effect of an adjudication of an issue which was determined by the District Court and the Court of Appeals only after a plenary hearing was had; and further submits that the holding of this Court in *Brown v. Allen,* 344 U. S. 433, is not controlling and did not prevent the District Court and the Court of Appeals from considering and deciding the issues in the instant case.

Respondent therefore respectfully submits that certiorari be denied.

LOUIS C. GLASSO and
ZENO FRITZ,
502 Plaza Building,
Pittsburgh 19, Pa.
Attorneys for Respondent.